(2)

No. 04-357

SUPREME COURT U.S.
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In The
Supreme Court of the United States

DAVID GUNDY, Warden,

Petitioner,

v.

CLARENCE SCOTT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT CLARENCE SCOTT IN OPPOSITION

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QUESTION PRESENTED

Whether the Michigan Court of Appeals applied the Chapman harmless-error test in an objectively unreasonable manner during its review of a Sixth Amendment Bruton violation, thus warranting the habeas relief granted by the United States District Court for the Eastern District of Michigan and affirmed by the Sixth Circuit Court of Appeals.

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STATEMENT OF THE CASE

In January 1995, Respondent Clarence Scott was convicted in the Recorder's Court for the City of Detroit ("trial court") of first-degree premeditated murder, felony-murder and possession of a firearm in the commission of a felony.[1] (Pet. App. 2a). The convictions stemmed from the April 2, 1994 shooting death of Elwin Lilley during a robbery in a McDonald's parking lot near Detroit Metro Airport in Romulus, Michigan. (Pet. App. 2a). The convictions of Scott resulted after the trial court permitted the State to offer as evidence the un-redacted confession of co-defendant Isaac Collier, in which Collier blamed Scott for the shooting death of Lilley. Collier did not testify at trial, and accordingly, Scott had no opportunity to cross-examine and confront his accuser, resulting in a violation of Scott's confrontation rights guaranteed by the Sixth Amendment to the United States Constitution and this Court's *Bruton* jurisprudence.[2] Over the objection[3] of trial counsel, the

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[1] Scott was convicted under MICH. COMP. LAWS § 750.316(1)(a) (2003) (first-degree premeditated murder); MICH. COMP. LAWS § 750.316(1)(b) (2003) (felony-murder); and MICH. COMP. LAWS § 750.227(b) (2003) (possession of firearm in commission of felony).

[2] When multiple defendants are tried concurrently, the use of an un-redacted confession by one defendant against another defendant violates the confrontation clause of the Sixth Amendment if the confessing defendant refuses to subject himself to cross-examination. *Bruton v. United States*, 391 U.S. 123 (1968).

[3] Prior to trial, Scott sought separate trials and separate juries, arguing that the use of the Collier statement would result in an unfair trial; both motions were denied. (C.A. App. 13). At trial, Scott requested that the jury not be allowed to hear Mr. Collier's confession as it pertained to Mr. Scott. (C.A. App. 71). That motion was not expressly denied, but the confession was introduced at trial without redaction. (C.A. App. 71). During the third day of trial, Scott objected to the introduction of Collier's statement on the grounds that Scott's Sixth

(Continued on following page)

following statement of Collier was read to the jury by a Romulus police sergeant:

> Saturday morning I woke up. . . .
>
> I counted my money. I had $365.00. I was short about $275.00.
>
> * * *
>
> I went back to the room and discussed it with Six-Nine.[4] He said if you get a ride, . . . we'll go get some money some way.
>
> * * *
>
> We drove out towards the airport and we circled around the Comfort Inn. We were planning to take some money from someone. There was no one around, so I drove over to McDonald's parking lot, circled around one time, and there was a car parked at the back of the building.
>
> Six-Nine said, "Back up to that car." The man was backed in also. He was reading the newspaper. Six-Nine got out of the car and stuck the gun on the man and told him to give him his money.
>
> The man resisted and he started tapping the gun out at his face. Then he started the car and tried to drive off. Six-Nine shot him. The car sped up into a pole and came backwards.
>
> At this time I tried to take off and the car hit our car and our car shut off. The car we were in has to be pushed [to] start, so immediately I . . . got

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Amendment right to confrontation would be violated if Collier ultimately did not testify at trial. (C.A. App. 252-256).

[4] Respondent Scott was known by the nickname "Six-Nine."

> out and ran, and Six-Nine was already out and he ran also. He ran towards the highway. I ran to the gas station looking for a running car.
>
> * * *
>
> I saw Six-Nine on a ramp or hill and stopped the car and waited for him. He got in and I said, "Throw that damn gun away," and he wouldn't do it.
>
> * * *

(C.A. App. 318-322).

As the District Court and the Court of Appeals would later recognize, the statement of Collier was the only evidence offered by the State that showed premeditation. (Pet. App. 42a, 55a-56a). Although the State presented witnesses and other hearsay statements from persons who heard "shots" and saw "a man in a black trench coat," none of the State's eyewitnesses actually saw the shooting. (C.A. App. 25). Yolanda Pezzat and Dean Patton specifically testified that they did not see the shooting and Ms. Pezzat's son did not testify about the shooting and never identified Scott. (C.A. App. 123, 165, 124-130). Roger Nohouig, the closest person to the incident, testified that a man in a black trench coat fled the scene, but he could not identify Scott and did not see anyone with a shot-gun. (C.A. App. 131-138). Nancy Vojakovic identified Scott as one of the men at the scene, but did not see an object in Scott's hands. (C.A. App. 140-150). Roberto Gonzalez saw a man in a black trench coat near the scene, but did not identify Scott. (C.A. App. 151-154).

The State also offered multiple hearsay statements, which failed to provide any evidence of premeditation. The hearsay testimony of Collier's girlfriend, Michelle Swartz

(read into the record because she disappeared before trial) only established that *Collier* told her that Scott shot somebody. (C.A. App. 276). Venita Campbell, Scott's girlfriend, who allegedly told the police that Scott said he killed someone, recanted her statement on the stand, testifying that the police threatened to take her children away if she did not say Scott was involved in the murder. (C.A. App. 207-208; 209-224). Finally, Lisa Campbell, Venita's sister, testified that Scott told her that he was involved in a shooting; however, she further testified on cross-examination that Scott had a history of bragging about involvement in violent events that were never true. (C.A. App. 196-200).

The State relied heavily on the Collier statement during its closing argument to demonstrate the element of premeditation. (C.A. App. 339). The State referred to Collier's confession no less than ten times during its closing argument. (C.A. App. 332-353). In fact, the State encouraged the jury to request the statement during their deliberations: "look at the statement, Exhibit No. 27, and ask for that and have it brought in." (C.A. App. 350). As observed by the Sixth Circuit:

> The prosecutor relied heavily on Collier's statement during closing arguments, and specifically linked it to the issue of premeditation. The prosecutor recounted Collier's statement that the two men went looking for money and borrowed the car to go find some, that they cruised around seeking a robbery prospect, that when they found one, they backed the car up, that "Scott [got] out of the car [and] [stuck] the gun through the window of Mr. Lilley," JA 338, and that when Lilley gave "the slightest sign of resistance, [Scott] coldbloodedly kill[ed] him." JA 349. **Precious little**

> **of this evidence would have been available to the prosecution in the absence of Collier's confession.**

(Pet. App. 57a) (emphasis added).

Scott appealed his conviction. The Michigan Court of Appeals vacated Scott's felony-murder conviction on double jeopardy grounds, but affirmed the conviction for first-degree premeditated murder. (Pet. App. 13a). In turning to the *Bruton* error, the Michigan Court of Appeals held that no *Bruton* error had occurred, because at the time the State offered the confession of co-defendant Collier as evidence, Collier's trial counsel stated that Collier would later testify. (Pet. App. 11a). Even though Collier later decided not to testify, the Michigan Court of Appeals found no error in the admission of the un-redacted statement. (Pet. App. 11a).

In reviewing the evidence for harmless error,[5] the Michigan Court of Appeals focused solely on evidence identifying Scott as the shooter, and did not even mention the lack of evidence of premeditation – a required element of the sole remaining homicide count against Scott for first-degree premeditated murder:

> Before the statement was admitted, there was ample testimony that Scott had killed the victim. Yolanda Pezzat heard a loud pop and identified

[5] Only after holding that no *Bruton* violation had occurred, did the Michigan Court of Appeals consider harmless error, noting "**even if** we were to consider that a *Bruton* violation occurred in this case, **we would find** the error to be harmless beyond a reasonable doubt." (Pet. App. 12a) (emphasis added). Accordingly, the Michigan Court of Appeal's harmless error review is essentially dicta to its holding that no *Bruton* error had occurred.

> defendant as the man standing next to the gray car with a gun in his hand. Three other witnesses, while not positively identifying defendant as the man with the shotgun, all described a man wearing a black trench coat as the shooter. Dean Patton also identified Scott as the man wearing the black trench coat and that Scott had a gun.
>
> * * *
>
> There was additional testimony from Sue Rucker that she saw Scott with the sawed-off shotgun. Moreover, Scott had told Lisa Campbell that he had been involved in a murder, and he told his girlfriend, Venita Campbell, that he had gotten into some trouble at the airport. Specifically, Venita told the police that Scott had told her that he had to kill a man that he was trying to rob. Venita later retracted this testimony at trial, but she had made this statement to the police.
>
> * * *
>
> Although Collier squarely places the actual shooting on Scott, there was ample evidence presented by the prosecutor before the statement was admitted that Scott was the shooter. Had the statement never been admitted, there was still overwhelming evidence that Scott was the shooter in this case.

(Pet. App. 12a-13a).

As is clear from the Michigan Court's analysis, the Court of Appeals' harmless error review focused solely on evidence identifying Scott as the shooter. The Michigan Court did not even address the element of premeditation, a prerequisite for a conviction of first-degree premeditated

murder.[6] This is significant because, having vacated the conviction for felony-murder, the sole remaining homicide count against Scott was for first-degree premeditated murder. Considering that the Michigan Court of Appeals failed to conduct any harmless error analysis within the context of the key element of the sole remaining homicide conviction, the Michigan Court of Appeals was objectively unreasonable in its application of the *Chapman* harmless error test.[7]

Scott next sought review by the Michigan Supreme Court, which denied his application for leave to appeal. (Pet. App. 15a). Having exhausted his state court remedies, Scott filed a petition for a *writ* of *habeas corpus*, with the United States District Court for the Eastern District of Michigan ("District Court"). (Pet. App. 18a).

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[6] First-degree premeditated murder is a statutory offense under Michigan law requiring the prosecution to prove "deliberate and premeditated killing" MICH. COMP. LAWS § 750.316 (2003); *People v. Haywood*, 209 Mich. App. 217, 229, 530 N.W.2d 497 (1995). While no exact determination of a minimum amount of time is possible, "[t]o premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v. Meier*, 47 Mich. App. 179, 184, 209 N.W.2d 311 (1973) (quoting *People v. Morrin*, 31 Mich. App. 301, 329-330, 187 N.W.2d 434 (1971)). "[L]egislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill." *People v. Hoffmeister*, 394 Mich. 155, 158 229 N.W.2d 305 (1975) (quoting *People v. Anderson*, 70 Cal.2d 15, 26, 447 P.2d 942, 948 (1968)).

[7] State Courts are required to apply the *Chapman* standard to claims of harmless constitutional error; the *Chapman* standard requires the state to prove that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1968).

The District Court conducted its review of Scott's *habeas* petition pursuant to the standards of 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996. (Pet. App. 20a-23a). The District Court cited and quoted the entire statutory standard in its opinion. (Pet. App. 21a). With respect to the "unreasonable application" standard, the District Court quoted *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) for the definition of "unreasonable application" –

> [A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under §§ 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

(Pet. App. 23a). The District Court stated: "*With these standards in mind*, the Court proceeds to the merits of the petition." (Pet. App. 23a) (emphasis added).

The District Court first held, and the State no longer disputes, that the holding of the Michigan Court of Appeals with respect to the admission of the co-defendant's un-redacted statement was contrary to clearly established federal law and constituted an unreasonable application of *Bruton* and its progeny. (Pet. App. 32a). The District Court held, "the decision of the Michigan Court of Appeals – that

no *Bruton* error occurred because [Mr. Scott's] rights under the Confrontation Clause were subordinate to the whims of his co-defendant – was an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." (Pet. App. 35a).

The District Court next turned to the harmless error review. The District Court focused on Mr. Scott's conviction for first degree premeditated murder and, more specifically, the lack of any evidence supporting a finding of premeditation:

> Absent Collier's confession, the nature of the State's case against the petitioner was largely circumstantial. * * * The confession was not cumulative evidence; rather, it tied the evidence together and clinched the case for the prosecution. It provided the only direct evidence that: (1) Collier and the petitioner planned a robbery; (2) the petitioner ordered Collier to back up to Lilley's car; (3) the petitioner demanded money from Lilley while pointing a gun at him; (4) when Lilley resisted, the petitioner or Lilley tapped the gun; and (5) the petitioner shot the victim as he tried to drive away.
>
> The confession likely had a substantial effect in persuading the jury to find the petitioner guilty of first-degree premeditated murder in addition to felony murder. * * * The defendant was convicted of both of these provisions, but **the felony murder conviction was vacated** by the court of appeals, **leaving only the conviction for first-degree premeditated murder for this Court to review** in this habeas proceeding. * * * Although first-degree *felony* murder could arguably be inferred from the circumstances surrounding the homicide, without Collier's untested confession

> the jury in this case would have had little basis for concluding that the homicide was the result of premeditation and deliberation. Rather, the facts are consistent with a case of a robbery gone wrong.
>
> With these considerations in mind, the Court concludes that the *Bruton* error was not harmless. It likely had a substantial and injurious effect on the jury's verdict and resulted in actual prejudice under the test adopted in *Brecht*. **Therefore, the state court's finding of harmless error was an unreasonable application of *Chapman*,** and the petitioner is entitled to habeas corpus relief on the basis of his *Bruton* claim.

(Pet. App. 41a-42a) (emphasis added).

By applying the *Brecht* standard[8] and holding that the admission of Collier's confession had a substantial and injurious effect on the jury's verdict, the District Court, by definition, also applied the AEDPA standard. As recognized by the District Court, if a *habeas* petitioner satisfies the *Brecht* standard, "he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . resulted from an unreasonable application of *Chapman*." (Pet. App. 37a). As the District Court held, "the state court's finding of harmless error was an unreasonable application of *Chapman*." (Pet. App. 42a).

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[8] Under the *Brecht* standard, a constitutional error cannot be harmless if the error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

The State appealed, and the Sixth Circuit affirmed the District Court's grant of *habeas* relief. On appeal to the Sixth Circuit, the State conceded that the trial court unreasonably applied Supreme Court precedents in admitting the un-redacted confession of Collier. (Pet. App. 51a). The Court then turned to the question of harmless error. (Pet. App. 53a). The Sixth Circuit found that the admission of the confession had a significant impact on the finding of premeditation:

> Premeditation is a different matter. While the State presented overwhelming admissible evidence of the shooter's identity, it presented little admissible evidence on premeditation – the key element distinguishing first-degree premeditated murder under Michigan law from felony murder or second-degree murder.
>
> * * *
>
> Collier's statement that "Six-Nine shot him," along with other parts of the confession, ruled out the possibility that the gun fired accidentally when the victim refused to hand over his money. Without Collier's confession, the record also would have contained little evidence of a "second look" or moment of deliberation as required for premeditation under Michigan law.

(Pet. App. 55a-56a). Accordingly, the Sixth Circuit held that the District Court correctly granted a conditional writ of *habeas corpus*. (Pet. App. 57a).

SUMMARY OF THE ARGUMENT

There is no compelling reason for this Court to grant the State's petition for a writ of certiorari. The State

incorrectly argues that the Circuit Courts are in conflict over the correct standard for federal *habeas* courts to apply in reviewing state court findings of harmless error. In fact, the Circuit Courts are in accord that such findings are reviewed pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). As this Court observed in *Lockyer v. Andrade*, 538 U.S. 63 (2003), AEDPA does not require a federal *habeas* court to subscribe to "any one methodology" in deciding the key questions under 28 U.S.C. § 2254(d)(1) – i.e., whether a state court decision is contrary to or involved an unreasonable application of clearly established federal law. The method used by the Sixth Circuit is to apply the *Brecht* "substantial and injurious effect" test. As the Sixth Circuit has reasoned, if a *habeas* petitioner satisfies the *Brecht* standard, "he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . resulted from an unreasonable application of *Chapman*."

The State's reliance on *Medina v. Hornung*, 372 F.3d 1120 (9th Cir. 2004) to demonstrate the existence of a conflict is misplaced. The Ninth Circuit in *Medina* merely recognized that different Circuit Courts use different analytical methods to determine whether a state court's harmless error finding resulted from an unreasonable application of *Chapman*. As observed by the Ninth Circuit, the Sixth Circuit subscribes to an approach that includes *Brecht* "as part of the 'unreasonable application' determination." *Id.* at 1125-1126. Under this analytical model, the reasonableness of the state court's *Chapman* application is determined by conducting a *Brecht* test. *Id.* The *Medina* decision thus reflects the different types of methodologies envisioned as permissible by this Court in *Lockyer*.

Contrary to the State's claim, the Sixth Circuit's approach is not a *de novo* review. The Sixth Circuit does not merely repeat the state court's application of *Chapman*. Rather, the Sixth Circuit uses a different standard. Nor does the Sixth Circuit's approach conflict with this Court's decision in *Mitchell v. Esparaza*, 540 U.S. 12 (2003). *Esparaza* merely requires the federal *habeas* court to determine if the state court applied harmless error review in an objectively unreasonable manner. As the Sixth Circuit has reasoned, if the evidence does not survive the *Brecht* test, then any harmless error determination must be the result of an unreasonable application of the *Chapman* standard.

Even if the different methodologies used by the Circuit Courts could be viewed as a conflict, the State's petition does not present an appropriate case to address this disagreement. First, the Michigan Court of Appeals' assessment of harmless error may be viewed as dicta, and thus, the Michigan Court's decision does not present an actual holding of harmless error for review. At a minimum, because the Michigan Court conducted no harmless error analysis in connection with the key premeditation element of the charge of premeditated first-degree murder, the state court's opinion essentially contains no assessment of harmless error with respect to the sole remaining homicide count of premeditated first-degree murder. Where a state court has conducted no harmless error review, the *Brecht* test is the only test that need be applied, and this test has already been applied by the lower courts. Finally, even if this Court were to accept review of the Michigan Court of Appeal's harmless error finding, the result would be the same. Because the Michigan Court of Appeals never even addressed the element of premeditation – the key

element of the sole remaining homicide charge – the Michigan Court clearly engaged in an objectively unreasonable application of the harmless error test.

For these reasons, there is no compelling reason for this Court to grant the State's petition for a writ of certiorari, and the State's petition should be denied.

ARGUMENT IN SUPPORT OF DENIAL OF STATE'S PETITION FOR WRIT OF CERTIORARI

I. There is No Conflict Between the Circuit Courts Regarding the Correct Standard to be Applied by a Federal *Habeas* Court in Reviewing a State Court's Determination of Harmless Error.

A. The Sixth Circuit Applies the "Unreasonable Application" Test of AEDPA.

The Sixth Circuit reviews state court findings of harmless error to determine whether the state court applied the *Chapman* harmless error test in an unreasonable manner. *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999); *Hill v. Hofbauer*, 337 F.3d 706 (6th Cir. 1999); *Bulls v. Jones*, 274 F.3d 379 (6th Cir. 2001). This is the standard of review required by the AEDPA amendments to 28 U.S.C. § 2254 and this Court's jurisprudence. In *Nevers*, the Sixth Circuit explicitly referenced the standard set out in 28 U.S.C. § 2254(d)(1): "The clear language of § 2254(d) permits us to review the Michigan Supreme Court's adjudication of *harmless error* only to determine whether it is contrary to or resulted from an *unreasonable application of clearly established federal law* – specifically, the harmless error standard of *Chapman v. California*."

Nevers, at 371 (emphasis added). In *Bulls*, the Sixth Circuit stated, "Confrontation Clause violations are subject to harmless error review . . . We therefore next consider whether the Michigan Court of Appeals's determination that the error was harmless was an *unreasonable application of clearly established federal law.*" *Bulls*, at 334 (emphasis added). In *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), the Sixth Circuit Court stated, "a state court's determination is considered '*unreasonable*' in the harmless error context, if . . . the error had a substantial and injurious effect or influence in determining the jury's verdict and resulted in actual prejudice." *Yukins*, at 873 (emphasis added).

The Sixth Circuit makes the AEDPA unreasonable application analysis by applying the harmless error review test of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The Sixth Circuit uses *Brecht* not as a different standard from that provided for under AEDPA, but as a method to make the "unreasonable application" determination required by AEDPA. The *Brecht* analysis asks whether the constitutional error had a "substantial and injurious" effect in determining the jury's verdict. *Brecht*, at 637-638. The *Brecht* test is more difficult for a habeas petitioner to meet than the *Chapman* standard; the petitioner has to show actual prejudice to meet the *Brecht* standard. In *Hill*, the Sixth Circuit stated that it used the *Brecht* analysis because, "if a petitioner can pass *Brecht* analysis, 'he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . resulted from an *unreasonable application* of *Chapman*.'" *Hill*, at 718.

B. The Ninth Circuit's Decision in *Medina* Does Not Represent a Conflict Among the Circuits.

The State's reliance on *Medina v. Hornung*, 372 F.3d 1120 (9th Cir. 2004) is misplaced. The Ninth Circuit and Sixth Circuit apply the same substantive standard of review to state court findings of harmless error; each determines whether the state court's finding was the result of an "unreasonable application" of the harmless error test. In *Medina,* the Ninth Circuit did not recognize a conflict, but rather acknowledged two analytical approaches to applying the same "unreasonable application" standard of review. As the Ninth Circuit observed, the Sixth Circuit applies an analysis that includes *Brecht* as part of its "unreasonable application" determination:

> Federal courts may include the *Brecht* analysis as part of the "unreasonable application" determination. Under this analytical model, the reasonableness of the state court's *Chapman* application is determined by conducting a *Brecht* test. If the prejudice in the case warrants relief under *Brecht*, the state court's *Chapman* analysis necessarily violated the "unreasonable application" clause of § 2254(d)(1).

Medina, at 1125-1126. Thus, the Ninth Circuit is not recognizing a conflict among the Circuit Courts; but rather, is acknowledging that different federal *habeas* courts may apply a different analytical approach to applying the **same** standard of review – the "unreasonable application" standard under § 2254(d)(1).

C. This Court's Jurisprudence Recognizes that Federal *Habeas* Courts Are Permitted to Apply Different Analytical Methods to Make the Unreasonable Application Determination Required By Section 2254(d)(1).

This Court has envisaged multiple approaches for making the "unreasonable application" determination. *See Lockyer v. Andrade*, 538 U.S. 63 (2003). In *Lockyer*, the Court stated that "AEDPA does not require a federal habeas court to adopt *any one methodology* in deciding the only question that matters under § 2254(d)(1) – whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." *Lockyer*, at 71 (emphasis added). The Sixth Circuit's approach is consistent with *Lockyer*; the Sixth Circuit is applying a legitimate methodology to determine whether a state court applied harmless error review in an unreasonable manner.

D. The Approach Taken by the Sixth Circuit is Consistent With This Court's Decision in *Mitchell v. Esparza*.

The Sixth Circuit's approach is also consistent with the Court's decision in *Mitchell v. Esparza*, 540 U.S. 12 (2003). In *Esparza*, the Court held that Federal courts must determine that a state court's determination of harmless error is "objectively unreasonable" before granting *habeas* relief. *Esparza*, at 18. The Court did not set out any specific criteria for making that determination, which is entirely consistent with *Lockyer* and the Sixth Circuit's approach in the matter below. *Esparza*, at 18-19. In its Writ Petition, the State has not pointed to or offered any "correct" criteria that Federal courts should apply when

determining whether state court determinations are "objectively unreasonable." Likewise, the State has not identified any criteria or test that would have created a different result than that which occurred below.

E. The Sixth Circuit's Approach is Not a *De Novo* Review. It is a Deferential Review of the State Court's Harmless Error Finding.

The approach taken by the Sixth Circuit is not *de novo* review. Applying *Brecht* to determine whether the state court's harmless error determination was reasonable is highly deferential. The Sixth Circuit has stated, "[w]e think that when the issue before the federal habeas court is the state court's finding of harmless error, the test set out by the Supreme Court in *Kotteakos* and explicitly reiterated in *Brecht* quite precisely captures Congress's intent as expressed in AEDPA and, therefore, continues to be applicable." In *Hill*, the Sixth Circuit stated, "[t]he disagreement is not about whether the AEDPA requires a high degree of deference to the state court's judgment; rather, it is about how to gauge the degree of deference necessary." *Hill*, at 361. *De novo* review would consist of a second application of the *Chapman* standard by the Federal reviewing court. The *Brecht* standard is a completely different standard than the *Chapman* standard, and thus not a *de novo* review. Under the approach taken by the Sixth Circuit, a federal court may determine that a trial error that was deemed harmless by the state court was not "harmless beyond a reasonable doubt," yet still find that the state court's application of *Chapman* was not unreasonable, because the error did not have a "substantial and injurious effect on the jury's verdict." This is a

deferential approach that does more than pay "lip service" to the requirements of AEDPA.

F. The Lower Courts Correctly Determined that the Michigan Court of Appeals' Harmless Error Review was the result of an Unreasonable Application of *Chapman*.

The District Court conducted its review of Scott's habeas petition pursuant to the standards of 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996. (Pet. App. 20a-23a). The District Court cited and quoted the entire statutory standard in its opinion. (Pet. App. 21a). The District Court quoted *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) for the proposition that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was **objectively unreasonable**." (Pet. App. 23a) (emphasis added). The District Court then reviewed the constitutional violation committed by the state court *"[w]ith these standards in mind."* (Pet. App. 23a) (emphasis added).

Applying the *Brecht* test, the District Court determined that the admission of the Collier statement had a substantial and injurious effect on the jury because there was no other evidence of premeditation. (Pet. App. 41a-42a). "[W]ithout Collier's untested confession the jury in this case would have had little basis for concluding that the homicide was the result of premeditation and deliberation." (Pet. App. 42a).

> With these considerations in mind, the Court concludes that the *Bruton* error was not harmless. It likely had a substantial and injurious

> effect on the jury's verdict and resulted in actual prejudice under the test adopted in *Brecht*. **Therefore, the state court's finding of harmless error was an unreasonable application of *Chapman*,** and the petitioner is entitled to habeas corpus relief on the basis of his *Bruton* claim.

(Pet. App. 42a) (emphasis added).

By applying the *Brecht* standard and holding that the admission of Collier's confession had a substantial and injurious effect on the jury's verdict, the District Court, by definition, also applied the AEDPA standard. As recognized by the District Court, if a *habeas* petitioner satisfies the *Brecht* standard, "he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . resulted from an unreasonable application of *Chapman*." (Pet. App. 37a). The Sixth Circuit properly affirmed.

II. The State's Petition Does Not Present an Appropriate Case for Review.

A. The Michigan Court of Appeals' Finding of Harmless Error Does Not Present an Actual Holding of Harmless Error, At Least Not With Respect to the Effect of the Erroneously Admitted Confession on Scott's Conviction for First-Degree Premeditated Murder.

The premise of the State's Petition – that a state court has reached a holding of harmless error beyond a reasonable doubt – does not truly exist in this case. The Michigan Court of Appeals' finding of harmless error came only after its holding that no *Bruton* violation had occurred. As the Michigan Court of Appeals noted, "**even if** we were to

consider that a *Bruton* violation occurred in this case, **we would find** the error to be harmless beyond a reasonable doubt." (Pet. App. 12a) (emphasis added). Accordingly, the Michigan Court of Appeal's harmless error review is essentially dicta to its holding that no *Bruton* error had occurred. More importantly, the state court never made *any* determination that the error was "harmless beyond a reasonable doubt" with respect to the effect of the confession on the premeditation element of Scott's conviction for first-degree premeditated murder – the only homicide count remaining after the State Court vacated the felony-murder count. Therefore, the Michigan Court of Appeals did not reach an actual holding of harmless error, and did make any finding of harmless error with respect to the premeditation element of Scott's conviction for first-degree premeditated murder.

Where the state court fails to conduct a harmless error review in the first instance, the federal *habeas* court must apply the *Brecht* test to determine whether the constitutional error committed by the trial court was harmless. *See Perry v. Johnson*, 532 U.S. 782, 795 (2001). "When a federal court applies harmless error in the first instance, the *Brecht* standard governs." *Medina*, at 1126, *citing Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000); *See also Gilliam v. Mitchell*, 179 F.3d 990, 994-995 (6th Cir. 1999) ("[w]e now explicitly adopt the position taken by the majority of our sister circuits and hold that the harmless error standard announced in *Brecht* applies even if a federal habeas court is the first to review for harmless error.").

A close inspection of the record reveals that the Michigan Court of Appeals did not reach an actual holding

of harmless error, at least not with respect to the premeditation element of Scott's conviction for first-degree premeditated murder. Therefore, the factual premise of the State's Writ Petition does not exist. Accordingly, the Michigan Court of Appeals' decision does not present an appropriate opportunity to address the State's assertion that this Court need clarify the standard of review to be applied by a federal *habeas* court when reviewing a state court's finding of harmless error.

B. Even if the Michigan Court of Appeals' Decision was Reviewed a Third Time, Without the Use of *Brecht*, the Result Would be the Same, Because the State Court's Failure to Consider the Effect of the Erroneously Admitted Confession on Scott's Conviction for First-Degree Premeditated Murder – the Only Remaining Count of Homocide – was an Objectively Unreasonable Application of the Harmless Error Test.

As is clear from the Michigan Court's analysis, the Court of Appeals' harmless error review was focused solely on evidence identifying Scott as the shooter. (Pet. App. 12a-13a). The Michigan Court did not even address the element of premeditation, a prerequisite for a conviction of first-degree premeditated murder.[9] Having vacated the conviction for felony-murder, the sole remaining homicide count against Scott was first-degree premeditated murder. Considering that the Michigan Court of Appeals failed to conduct any harmless error analysis within the context of

[9] Supra, fn. 6.

the key element of the sole remaining homicide conviction, the Michigan Court of Appeals was objectively unreasonable in its application of the *Chapman* harmless error test.

As both the District Court and Sixth Circuit correctly noted, the erroneously admitted confession was the only evidence of premeditation.

> The confession likely had a substantial effect in persuading the jury to find the petitioner guilty of first-degree premeditated murder in addition to felony murder. * * * The defendant was convicted of both of these provisions, but **the felony murder conviction was vacated** by the court of appeals, **leaving only the conviction for first-degree premeditated murder for this Court to review** in this habeas proceeding. * * * Although first-degree *felony* murder could arguably be inferred from the circumstances surrounding the homicide, **without Collier's untested confession the jury in this case would have had little basis for concluding that the homicide was the result of premeditation and deliberation**. Rather, the facts are consistent with a case of a robbery gone wrong.

(Pet. App. 41a-42a) (emphasis added).

> Without Collier's confession, the record also would have contained little evidence of a "second look" or moment of deliberation as required for premeditation under Michigan law.

(Pet. App. 55a-56a).

> The prosecutor relied heavily on Collier's statement during closing arguments, and specifically linked it to the issue of premeditation. The

> prosecutor recounted Collier's statement that the two men went looking for money and borrowed the car to go find some, that they cruised around seeking a robbery prospect, that when they found one, they backed the car up, that "Scott [got] out of the car [and] [stuck] the gun through the window of Mr. Lilley," JA 338, and that when Lilley gave "the slightest sign of resistance, [Scott] coldbloodedly kill[ed] him." JA 349. **Precious little of this evidence would have been available to the prosecution in the absence of Collier's confession.**

(Pet. App. 57a) (emphasis added).

Clearly, the confession was the only significant evidence of premeditation. Yet, when reviewing whether the erroneous admission of the confession was harmless, the Michigan Court of Appeals failed to even consider the effect of the confession on the element of premeditation, the key element to the only remaining homicide count of first-degree premeditated murder. If a state court fails to consider the effect of the constitutionally improper evidence on the key elements of the crime for which the defendant was convicted, then the state court has applied the *Chapman* harmless error test in an objectively unreasonable manner. Accordingly, even if this Court were to review the Michigan Court of Appeal's finding of harmless error for objective unreasonableness, the result would be the same.

CONCLUSION

The State's petition for a writ of certiorari should be denied.

Respectfully submitted,

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